Benjamin H. Realty Corp. *and* Residential Construction and General Service Workers, Laborers Local 55. Case 22–CA–110689

August 25, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by Residential Construction and General Service Workers, Laborers Local 55 (the Union) on August 6, 2013, the Acting General Counsel issued the complaint on August 19, 2013, alleging that Benjamin H. Realty Corp. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 22–RC–087792. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting defenses.

On September 10, 2013, the Acting General Counsel filed a Motion for Summary Judgment and a memorandum in support. On September 11, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

On November 13, 2014, the Board issued a Decision, Certification of Representative, and Notice to Show Cause in these proceedings.[1] In that decision, the Board acknowledged that it lacked a quorum when it had denied the Respondent's request for review in the underlying representation proceeding and stated that in such circumstances, the prior denial would not be given preclusive effect. The Board then considered the Respondent's arguments anew, denied the request for review, and in an abundance of caution issued a new certification of representative. In addition, the Board provided leave to the General Counsel to amend the complaint on or before November 24, 2014, to conform with the current state of the evidence, including whether the Respondent had agreed to recognize and bargain with the Union after the November 13, 2014 certification of representative issued.

Thereafter, on December 10, 2014, the Respondent filed a motion for reconsideration of the November 13, 2014 Decision, Certification of Representative, and Notice to Show Cause, based on the fact that at the time the decision issued, the Board had not acted on the Respondent's October 15, 2014 Motion to Reopen the Record in Case 22–RC–087792. By unpublished Order dated May 7, 2015, the motion to reopen the record and the motion for reconsideration were denied.

On February 6, 2015, the General Counsel filed a motion to amend the complaint, under Section 102.17 of the Board's Rules and Regulations. The General Counsel stated in his motion that the November 24, 2014 date given for amending the complaint was not able to be met, but that the amendment is necessary now in light of events that occurred after that date. The General Counsel further asserts that granting this motion to amend would not result in prejudice to any party. The complaint attached to the General Counsel's motion had been amended in relevant part to include the allegations that, about January 22, 2015, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees, and that, since January 22, 2015, the Respondent refused to do so and continues to refuse to do so.

On February 13, 2015, the Respondent filed an opposition to the General Counsel's motion to amend the complaint, arguing that the motion to amend was premature until the motions to reopen the record and for reconsideration had been ruled on; that the General Counsel had failed to offer any reasonable excuse or special circumstance that would justify missing the November 24, 2014 date provided for amending the complaint; and that the General Counsel's motion to amend was filed pursuant to the wrong section of the Board's Rules and Regulations.

On May 27, 2015, the Board issued an order granting the General Counsel's Motion to Amend the complaint, directing that any further answer to the amended complaint be filed on or before June 10, 2015, and giving a further notice that cause be shown, in writing, on or before June 17, 2015, as to why the Board should not grant the General Counsel's motion for summary judgment. Thereafter, the Respondent filed an answer to the amended complaint.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the certification on the basis of its contention in the underlying representation proceeding

[1] 361 NLRB No. 103.

that the bargaining unit is inappropriate. The Respondent alleges as its affirmative defense that "Respondent intends to challenge all Board Decisions by Appeal to the United States Circuit Court of Appeals." The Respondent does not further articulate what alleged deficiencies it finds in any particular decision, and we therefore are unable to address or correct any such alleged deficiencies. Thus, the Respondent's affirmative defense does not clearly articulate any justiciable issue, and we reject it.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New Jersey corporation is engaged in the maintenance of residential apartment buildings located in multiple locations throughout East Orange and Orange, New Jersey.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, purchased and received at its New Jersey facilities, goods valued in excess of $50,000 directly from suppliers located outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held on November 8, 2012, the Union was certified on November 13, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time superintendents, maintenance employees, porters and painters employed by the Employer at its facilities located at 370 Central Avenue, Orange, New Jersey; 245 Reynolds Terrace, Orange, New Jersey; 500 South Harrison Street, Orange, New Jersey; 466 Highland Avenue, Orange, New Jersey; 447-49 Prospect Street, East Orange, New Jersey; 36 South Munn Street, East Orange, New Jersey; 40 South Munn Street, East Orange, New Jersey; 46 North Arlington Avenue, East Orange, New Jersey; 52 North Arlington, East Orange, New Jersey; 50 South Arlington Avenue, East Orange, New Jersey; 52-54 South Arlington Avenue, East Orange, New Jersey; 67-76 Melmore Gardens, East Orange, New Jersey; 106 North Arlington, East Orange, New Jersey; 111 Halsted Street, East Orange, New Jersey; 83-85 Halsted Street, East Orange, New Jersey; 268 North Oraton Parkway, East Orange, New Jersey; 288 4th Avenue, East Orange, New Jersey; 161 Prospect Street, East Orange, New Jersey and 91 Prospect Street, East Orange, New Jersey, the only facilities involved herein excluding all clerical employees, security employees, engineering employees, inspectors and managerial employees.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About July 8, 11, and 24, and August 2, 2013, and January 22, 2015, the Union, by letter, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit.

Since about July 8, 2013, and continuing to date, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[2]

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[2] In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

> Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); accord *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Benjamin H. Realty Corp., East Orange and Orange, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Residential Construction and General Service Workers, Laborers Local 55 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time superintendents, maintenance employees, porters and painters employed by the Employer at its facilities located at 370 Central Avenue, Orange, New Jersey; 245 Reynolds Terrace, Orange, New Jersey; 500 South Harrison Street, Orange, New Jersey; 466 Highland Avenue, Orange, New Jersey; 447-49 Prospect Street, East Orange, New Jersey; 36 South Munn Street, East Orange, New Jersey; 40 South Munn Street, East Orange, New Jersey; 46 North Arlington Avenue, East Orange, New Jersey; 52 North Arlington, East Orange, New Jersey; 50 South Arlington Avenue, East Orange, New Jersey; 52-54 South Arlington Avenue, East Orange, New Jersey; 67-76 Melmore Gardens, East Orange, New Jersey; 106 North Arlington, East Orange, New Jersey; 111 Halsted Street, East Orange, New Jersey; 83-85 Halsted Street, East Orange, New Jersey; 268 North Oraton Parkway, East Orange, New Jersey; 288 4th Avenue, East Orange, New Jersey; 161 Prospect Street, East Orange, New Jersey and 91 Prospect Street, East Orange, New Jersey, the only facilities involved herein excluding all clerical employees, security employees, engineering employees, inspectors and managerial employees.

(b) Within 14 days after service by the Region, post at its facilities in East Orange and Orange, New Jersey, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 8, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which the Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 25, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Residential Construction and General Service Workers, Laborers Local 55 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time superintendents, maintenance employees, porters and painters employed by us at our facilities located at 370 Central Avenue, Orange, New Jersey; 245 Reynolds Terrace, Orange, New Jersey; 500 South Harrison Street, Orange, New Jersey; 466 Highland Avenue, Orange, New Jersey; 447-49 Prospect Street, East Orange, New Jersey; 36 South Munn Street, East Orange, New Jersey; 40 South Munn Street, East Orange, New Jersey; 46 North Arlington Avenue, East Orange, New Jersey; 52 North Arlington, East Orange, New Jersey; 50 South Arlington Avenue, East Orange, New Jersey; 52-54 South Arlington Avenue, East Orange, New Jersey; 67-76 Melmore Gardens, East Orange, New Jersey; 106 North Arlington, East Orange, New Jersey; 111 Halsted Street, East Orange, New Jersey; 83-85 Halsted Street, East Orange, New Jersey; 268 North Oraton Parkway, East Orange, New Jersey; 288 4th Avenue, East Orange, New Jersey; 161 Prospect Street, East Orange, New Jersey and 91 Prospect Street, East Orange, New Jersey, the only facilities involved herein excluding all clerical employees, security employees, engineering employees, inspectors and managerial employees.

BENJAMIN H. REALTY CORP.

The Board's decision can be found at www.nlrb.gov/case/22-CA-110689 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, D.C. 20570, or by calling (202) 273-1940.